72-348

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term A.D. 1972

No. 72-348

JOHN A. HUTTER, et al.,
Petitioners
vs.
JOHN TANCK, et al.,
Respondents

Appeal from the United States Court of Appeals Seventh Circuit

(No. 71-1178)

PETITION FOR A WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

SEVENTH CIRCUIT

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OPINIONS IN COURT BELOW

(a) There are no official or unofficial reports. The opinion of the courts below is appended to this petition.

JURISDICTIONAL GROUNDS

(b) The jurisdiction of this court is

invoked according to Section 28, paragraph 1257(3) on the grounds that the decisions of the lower courts have denied petitioners their rights claimed under the Constitution and the Amendments thereto.

(i) The judgment of the Court of Appeals Seventh Circuit was dated and entered April 5, 1972.

(ii) The Court of Appeals, Seventh Circuit denied a petition for rehearing on May 31, 1972.

(iii) Petitioners believe that the statutory provisions of Section 28 paragraph 1257(3) confer jurisdiction on this court to review the judgment by a writ of Certiorari.

QUESTIONS PRESENTED FOR REVIEW

(c) In a diversity action may the plaintiffs claim as their jurisdictional amount, damages resulting from the tortious acts of an Assessor or members of a Board of Review when specifically provided by State statute?

In an action claiming the deprivation of Constitutional rights under Amendment 14 pertaining to equal treatment under the law and due process, did the lower courts err in dismissing the action because in their opinion a specific amount was not met? (In no way pertaining to this suit.)

CONSTITUTIONAL PROVISIONS INVOLVED

(d) Amendment 14 of the United States Constitution pertaining to equality before the law and due process.

STATEMENT OF THE CASE

(e) The petitioners are citizens of Illinois. The respondents are the Assessor and Members of the Board of Review, of Egg Harbor Town, and all are citizens of Wisconsin.

The plaintiffs own real property and operated a farm resort, in the town of Egg Harbor, Wisconsin, and the defendants have conspired to injure the plaintiffs, deprive them of their property and drive them from Door County, Wisconsin, where the town of Egg Harbor is located.

The question of taxes is not involved here. (A suit involving taxes is before the Supreme Court of Wisconsin case No. 55[illegible], August term 1971).

On September 2, 1970, on motion, his honor Judge John W. Reynolds of the U. S. District Court for the Eastern District of Wisconsin dismissed the case on the grounds, "It is simply that plaintiffs allege that their real property was assessed too high and unfairly and contrary to law." A Motion to reconsider was denied December 29, 1970.

The United States Court of Appeals for the Seventh Circuit affirmed the dismissal stating that the case was: "merely a suit to recover back taxes allegedly overcharged by the defendants and paid by the plaintiffs."

[redacted] the court denied [redacted] petition for a rehearing.

[redacted] petition for rehearing [redacted] to the Appendix [redacted] should be considered by [redacted] on a duplication will not be [redacted] as mentioned supra. The [redacted] have sued the State tax [redacted] for relief from the discrim- [redacted] unconstitutional [redacted] as above. The proce- [redacted] a formal hearing before [redacted] with a required transcrip- [redacted] a court reporter; a writ of [redacted] to the Circuit Court; an [redacted] to the State Supreme Court.

[redacted] complaint, evidentiary [redacted] are set forth in paragraphs 7-12 [redacted] an integral part of the basis for [redacted] 13 and 14 which constitute the [redacted] for this action.

[redacted] FOR FEDERAL JURISDICTION

(a) 1. This is a diversity action involving a tort.

2. The appellants claim their Civil [redacted] rights were violated.

[redacted] STATEMENT OF WRIT

(a) The petitioners claim that the respondents, acting under color of State law, conspired to confiscate their property, and in collusion with others, cause them to lose their property and business and drive them from Door County, Wisconsin, because they were outsiders - interlopers from Illinois and not part of the local establishment.

In so doing the respondents violated the Civil and Constitutional rights of a citizen of Illinois to enter Wisconsin, purchase and own property, engage in business, and have the same equal rights that citizens of Wisconsin have.

As set forth in detail in petitioners petition for a rehearing - see Appendix - the Wisconsin Code - chapter 70.501 and 70.502 allows an action in tort for all damages and remedies "given by law in actions for damages for tortious or wrongful acts." No limitation is present on punitive damages. Specifically applies to Assessors and Town Boards.

The attitude of this Town Board in a small township in Wisconsin does not differ from that of the Daley dynasty in Chicago (see Appeal No. 71-1419, October Term 1972 this Supreme Court).

The members have been in control 30-50 years and no one has been able to interfere with whatever they do. They do not have the vaguest idea of what the Constitution means or provides.

All courts, State or Federal, bend over backwards, trying to avoid protecting the Constitutional rights of citizens where property is involved.

There can be no freedom where people do not have the right to possess private property and have equal protection before the law.

The great, silent, middle class is becoming more and more disillusioned. Every phase of their lives is being attacked. Only the Constitution can protect them.

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All of government, regardless of party is a closely knit establishment where one part will always try to protect the other part.

Every politician official - no matter what category - owes many debts to others as he climbs up the ladder. He will not upset the applecart if he can avoid it.

If a poll were taken how many persons would say they receive fair treatment from their government? Without clout, all categories of our population are without help before a growing bureaucracy. Courts solve the problem of increased case loads by telling the litigant seeking protection of his Constitutional rights: go away, don't bother us, instead of modernizing procedure.

Illinois Supreme Court has the effective devises of requiring "Leave to appeal" and then refusing it to most seekers.

Wisconsin has not "modernized;" its Supreme Court must hear all cases.

This court of course, can lighten its increasing case load by denying more and more petitions for a writ of Certiorari. It simply means that more and more persons will be denied the key word emblazoned over the door of this court building and more and more governmental units will take heart and deny our citizens their Constitutional rights.

All these petitioners are asking this court is the right to present their case for decision and justice before a neutral unbiased jury.

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The court is asked to reverse the order of the lower court dismissing their case.

Respectfully submitted,

John A. Hutter
Attorney pro se and for
other Petitioners

* * * * * * * *

APPENDIX

COMPLAINT

Now come the plaintiffs, John A. Hutter, Clara N. Hutter and Hutter Northern Trust, by John A. Hutter, Trustee, by their attorney, John A. Hutter, and complain of the defendants as follows:

1. That jurisdiction of this Honorable Court is invoked pursuant to the provisions of Title 28, Sections 1331, 1332 and other sections applicable.

2. That the matter in controversy exceeds Ten Thousand Dollars ($10,000.) exclusive of interest and costs.

3. That at the time of the commencement of this action and at all subsequent times, including the present, the plaintiffs have been citizens of the State of Illinois.

4. That at the time of the commencement of this action and at all subsequent times, including the present, the defendants have been citizens of the State of Illinois within the area included in the Eastern District of the United States District Court.

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5. That the plaintiffs own real property in Door County, Wisconsin (Egg Harbor Township).

6. That the defendants are or have been officials of the Township of Egg Harbor.

7. That the plaintiffs allege and claim the defendants have deliberately, maliciously and by acts of malfeasance of office, assessed the real property of plaintiffs at a rate so high that it has destroyed the value of plaintiffs real property - farm property which is under the Federal land bank which provide yearly payments of about One Hundred Dollars a year with the agreement that plaintiff will not be permitted to produce any crops on restricted acreage.

8. That plaintiffs entire gross income, or receipt from said property as reported in their Federal and State farm income tax returns was approximately Twelve Hundred Dollars ($1,200.00) for the year 1969.

9. That the real estate taxes assessed against plaintiff each year amounts to approximately Three Thousand Dollars, ($3,000.00).

10. That plaintiffs allege and claim that since they acquired their farm about twenty years ago, the defendants have increased the assessed value of their property one thousand times which is an amazing 24,000%. During this period Door County has been declared a poverty area by the Federal government, population has decreased, the shipyard has just about shut down, the cherry producers and canners have become bankrupt, dairy farms have been

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forced to cease operation (including that of plaintiffs).

11. That the taxes assessed against plaintiffs by defendants is at a rate approximately thirty times that assessed against their own property and all other comparable farm property in Door County.

12. That the plaintiffs aver and claim the defendants have conspired with members of the Door County Chamber of Commerce to assess plaintiff's property so high that they would be forced to abandon their property and cease residence and operations in Door County. A suit pending against the Door County Chamber of Commerce in the U. S. District Court, Northern District of Illinois, before the Honorable Judge Julius J. Hoffman, has twice been decided in favor of plaintiffs No. 16819 and No. 17661 in appeals before the United States Court of Appeals Seventh District.

13. That the plaintiffs aver and claim that the defendants, by alleged acts of malfeasance and violation of and omission of duty, are liable to plaintiffs under provisions 70:501, 70:502 of the statutes of the State of Wisconsin.

14. That the plaintiffs aver and claim the defendants by their acts and conduct have deprived plaintiffs of their rights under the United States Constitution Amendment 14 pertaining to equal treatment under the law and due process.

15. That the plaintiffs aver and claim that the direct or proximate result of the wrongful acts of the defendants, and in view of the fact that aforementioned acts were done in a wilful and malicious manner, said plaintiffs are entitled to

forced to cease operation (insofar that of plaintiffs).

11. That the taxes assessed against plaintiffs by defendants is at a rate confiscatory, thirty times that assessed against their own property and all other comparable farm property in Door County.

12. That the plaintiffs aver and plead that the defendants have conspired with members of the Door County Chamber of Commerce to harass plaintiff's property so much that they would be forced to abandon their property and cease residence and operations in Door County. A suit pending against the Door County Chamber of Commerce in the U. S. District Court, Western District of Illinois, before the Honorable Judge Julius J. Hoffman, has already been decided in favor of plaintiffs (No. 71661 and No. 72661 in appeals before the United States Court of Appeals Seventh Circuit).

13. That the plaintiffs aver and plead that the defendants, by alleged acts of malfeasance and violation of and conspiracy to violation of [illegible] other provisions 70:502 of the Statutes of the State of Wisconsin,

14. That the plaintiffs aver and plead that the defendants by their acts and actions have deprived plaintiffs of their rights under the United States Constitution to equal protection of the law and due process.

15. That the plaintiffs aver and plead that the direct or proximate result of the wrongful acts of the defendants, and in view of the fact that aforementioned acts were done in a willful and malicious manner, said plaintiffs are entitled to

actual, exemplary and punitive damages in the sum of Five Hundred Thousand Dollars.

16. WHEREFORE, plaintiffs demand a judgment in the sum of Five Hundred Thousand Dollars ($500,000.00).

(signed) John A. Hutter

* * * * * * * * *

ORDER U.S. COURT OF APPEALS SEVENTH CIRCUIT

This is an appeal from the dismissal by the district court of an action for actual and punitive damages due to the imposition of allegedly excessive real estate taxes by Egg Harbor Township, Wisconsin. The district court dismissed the action upon motion of the defendants, all of whom are present or past officials of Egg Harbor Township, on the ground that the jurisdictional amount-in-controversy requirements had not been met. 28 U.S.C. § 1331(a) and 1332(a). The plaintiffs asserted that their real estate taxes were illegally assessed and sought to recover them as well as approximately a half-million dollars in punitive damages.

This action is, despite plaintiffs' protestations to the contrary, merely a suit to recover back taxes allegedly overcharged by the defendants and paid by the plaintiffs. As such, it is maintainable in a Federal court only if plaintiffs have pleaded, inter alia, a good faith allegation that the amount in controversy exceeds $10,000. exclusive of costs and interest. Absent clear proof to the contrary, plaintiffs' amount-in-controversy allegations must be taken as well-founded. St. Paul Mercury Indem. Co. v. Red Cab Co.

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303 U.S. 283, 288 (1937). Here, however, the amount claimed by plaintiffs to be in controversy is clearly wrong, and it is also clear as a matter of law that the necessary amount in controversy cannot be properly pleaded on these facts. According to plaintiffs' complaint, the total assessed by defendants is $3,000. We are required to apply the appropriate Wisconsin statute of limitations in this action pursuant to Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and that limitation requires that actions to recover taxes illegally collected be brought within one year. Wis. Stat. Ann. § 74.73(1). Since punitive damages are not recoverable pursuant to Wisconsin statute against public officials where damages are claimed for their official acts, Wis. Stat. Ann. § 895.43(2), the jurisdictional amount in controversy cannot be met on the facts pleaded by plaintiffs. The judgment of dismissal is affirmed.

* * * * * * * * *

PETITION FOR REHEARING

The Plaintiffs-Appellants believe that the Court overlooked some essential facts in this appeal in finding "Since punitive damages are not recoverable pursuant to Wisconsin statute against public officials where damages are claimed for their official acts Wis. Stat. Ann. P895.43(2), the jurisdictional amounts in controversy cannot be met on the facts pleaded by plaintiffs."

1. The above quoted statute is not here applicable; the statute quoted on page 12 of Appellant's brief and argument is namely: Section 70.503 Civil Liability of Assessor or Member of Board of Review:

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"If the Assessor or any member of the Board of Review of any assessment district shall be guilty of any violation or commission of duty as specified in 70.501 and 70.502 he shall be liable in damages to any person or persons who may sustain loss or injury thereby, to the amount of such loss or injury, and any person sustaining such loss or injury shall be entitled to all the remedies given by law in actions for damages for tortious or wrongful acts."

No limitation is present on punitive damages.

In averment 12 of complaint, the plaintiffs claim conspiracy which is a tort.

In averment 13 plaintiffs claim damages under above quoted Wisconsin Statute.

In no sense are taxes involved here. (The question of taxes is before the Wisconsin Supreme Court, Case No. 55 awaiting oral argument.)

The board members and assessor threatened the Appellants with bodily harm; (Mrs. Hutter is age 76 years) with increasing taxes illegally every year if they did not sell out; they prevented Appellants from securing a Writ of Certiorari by testifying untruthfully that Appellants refused to testify under oath; they made necessary a detailed study by John Hutter of thousands of pieces of assessed real estate throughout Door County to prepare action proving discriminatory, confiscatory and unconstitutional assessments in wanton violation of their oath of office to uphold the Wisconsin and U. S. Constitutions by assessing property on a basis of equality. (The time spent by John Hutter as C.P.A. and Attorney had a value in excess of

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$12,000. which would certainly be in excess of $10,000. statutory amount exclusive of costs and interest. The rule pertaining to statutory amount does not require that the claim be itemized.

Furthermore on the question of real actual damages these defendants may cause the plaintiffs to lose forever farm property which the defendants assessed at $100,000. but which have gross annual receipts of $75.00 from the Federal government in land bank payments for not growing crops.

The court is asked to take judicial notice of the intention of Door County to seek a tax deed to plaintiffs property on June 23, 1972.

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This court is in error when it states, "This action is, despite plaintiffs protestations to the contrary, merely a suit to recover back taxes allegedly overcharged by the defendants and paid by the plaintiffs.

If the court will examine plaintiffs complaint, pages 2, 3, and 4 of Appendix they will not find any claim for taxes whatsoever. They will find however, alleged wanton acts of defendants, illustrating the malfeasance of the defendants. These averments clearly illustrate some of the means by which these Assessors and members of the Town Board of Egg Harbor, Wisconsin, blatantly flaunted their contempt for both the State and the Federal Constitutions they had sworn to uphold.

In averment 14, the plaintiffs claim the defendants, "by their acts have deprived plaintiffs of their rights under the United States Constitution Amendment 14 pertaining to equal treatment under the law and due process."

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As pointed out to court in oral argument there is no specific amount of damages required before the Federal courts have jurisdiction to protect the Civil and Constitutional rights of anyone within the jurisdiction of the court. Here the acts occurred within the jurisdiction of the Trial court.

Under Federal law there is no provision denying punitive damages where State officials, under color of State law, commit acts repugnant to the U. S. Constitution and any State law as providing would be repugnant to the Federal Constitution.

As pointed out to this court in oral argument, courts generally seem reluctant to protect a person from the violation of his Civil and Constitutional rights where property rights are involved, especially so when the taxing procedure of a State is involved.

This court was told by counsel in oral argument that there can be no freedom for anyone where the protection of his property rights under the Constitution are denied by those persons who swore under oath to uphold and defend the Constitution when they took office, and this of course, includes all members of the bar.

Here the Town Board members have held office for 30 - 50 years. No one has ever been able to question their arrogant disregard of the Constitution. They operate as if they ruled the Duchy of Liechtenstein. State officials break into hearings and simply tell them no one can disturb their actions.

Their attorney tells them that all he has to do if someone files suit against

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them is to make a motion to dismiss and the court will quickly find some excuse for obliging. When this has gone for fifty years how would anyone expect bureaucrats to act?

The Appellants believe that a study of this petition will make clear the right of the Appellants to have their day in court.

This court is asked to protect Appellants' Constitutional rights.

The court is asked to set aside and reverse the judgment of dismissal of the trial court.

Respectfully submitted,

* * * * * * * * *

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 31, 1972

Before

Hon. Luther M. Swygert, Chief Judge
Hon. John Paul Stevens, Circuit Judge
Hon. William J. Campbell, Senior District Judge

JOHN A. HUTTER, et al., Plaintiffs-Appellants,	Appeal from the U.S. District Court for the Eastern District of Wis. (Reynolds 68 C 502)
No. 71-1178 vs.	
JOHN TANCK, ARTHUR PETERSON, JR. ED BAVRY, MILTON HAEN, TILDEN GAEBERT, and L. VOLKMAN Defendants-Appellees.	

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IT IS ORDERED by the Court that the petition for rehearing filed in this appeal be and the same is hereby DENIED.

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No. 72-348

In the
Supreme Court of the United States
OCTOBER TERM, 1972

JOHN A. HUTTER, et al.,
Petitioners,

vs.

JOHN TANCK, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, John Tanck, et al., oppose the Petition for Writ of Certiorari filed herein by petitioners, John A. Hutter, et al, for the reasons set forth below.

Opinions Below

The Petition for Writ of Certiorari correctly sets forth the Judgment of the United States Court of Appeals, 7th Circuit, which is dated April 5, 1972 (Pet. 10-11). However, the Petition fails to set forth the written opinion of the District Court from which appeal was taken by petitioners. Respondents deem that the District Court's written opinion is very relevant to these current proceedings and therefore sets it forth now;

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOHN A. HUTTER, et al.,

Plaintiffs,

vs.

JOHN TANCK, et al.,

Defendants.

ORDER OF DISMISSAL
Civil Action No. 69-C-593

This an action for damages arising out of allegedly excessive and discriminatory assessments of real property owned by the plaintiffs and located in Door County, Wisconsin. Defendants are officials, past and present, of the Township of Egg Harbor in Door County.

Jurisdiction is asserted under 28 U.S.C.A. § 1331, federal question, and 28 U.S.C.A. § 1332, diversity of citizenship. Each of these sections has the jurisdictional requirement that the matter in controversy exceed the sum of $10,000, exclusive of interest and costs.

The complaint alleges that the real estate taxes assessed each year against plaintiffs' property amount to approximately $3,000.

Defendants have moved to dismiss the complaint on the ground, among others, that the jurisdictional amount is not present.

An earlier action brought by these same plaintiffs and presenting substantially the same claim was dismissed by Judge Myron L. Gordon—decision and order dated April 24, 1969, in Civil Action No. 68-C-364. That dismissal

was affirmed by the court of appeals, adopting Judge Gordon's opinion. *Hutter Northern Trust* v. *Haen,* No. 17662, decided November 13, 1969, in an unpublished opinion. On April 27, 1970, the Supreme Court denied certiorari—397 U.S. 1062.

The following language from Judge Gordon's decision is dispositive of the issue in this action:

> "In my opinion, the complaint does not satisfy the jurisdictional requirement that the matter in controversy exceed $10,000. 28 U.S.C. § 1331. In a diversity action, the court is obliged to apply the substantive law of the state. Under § 74.73(1) Wis. Stats., an action to recover for illegal taxes paid must 'be brought within one year after such payment and not thereafter'.
>
> "Under the foregoing provision of the Wisconsin statutes, the plaintiffs' entitlement to recover for allegedly illegally assessed past taxes is very limited. While the complaint does not specifically assert the amount of the taxes paid for any given year, it would appear from a statement made on page 7 of the complaint that the plaintiffs contend that $3,000.00 was assessed for 1967. In view of the provisions of the cited Wisconsin statute, it is clear that the matter in controversy does not exceed the sum of $10,000."

The gravamen of the complaint in the earlier action is the same as the one in the present case. It is simply that plaintiffs allege that their real property was assessed too high and unfairly and contrary to law.

While the two complaints are not identical, the one in the present case is not so changed as to save it from the fate that befell the complaint in the earlier action. Of the six defendants name in this complaint, two were not defendants in the prior action; this complaint does not

seek injunctive relief; it does allege that the defendants conspired with certain other persons in making wrongful assessments; and the ad damnum clause in this complaint has been increased to $500,000 from the $100,000 sought earlier. These variances will not cure the jurisdictional infirmities which were found to exist in the earlier action. The reasoning and conclusions of Judge Gordon contained in the decision and order of April 24, 1969, in Civil Action No. 68-C-364 are equally applicable to the present action and I adopt them. This compels a similar result.

Now, therefore, based on the foregoing,

IT IS ORDERED that plaintiffs' complaint must be and it is hereby dismissed.

Dated this 2nd day of September, 1970.

John W. Reynolds
U. S. District Judge

Further, petitioners' Appendix contains the complaint which was filed originally. While harmless, it does contain a deviation from the complaint served on respondents, in that paragraph 10 of the complaint as served recites "100,000 %", while the complaint as reproduced in the petition recites "24,000 %" (Pet. p. 8).

Jurisdiction

The petition invokes Title 28 U.S.C. §1257(3) as jurisdiction. Clerly that is erroneous for that section refers to "State Courts; appeals; Certiorari". There is no doubt that this court has jurisdiction for a petition for a writ of certiorari, but respondents suggest that jurisdiction is by U.S. Code Title 28, §1254(1).

Questions Presented

From a favorable to petitioners reading of the petition, petitioners apparently (†) present two questions in the petition; the first is whether damages for tort are includable in arriving at jurisdictional amount, when the action for tort is provided for by state statute; secondly, whether the lower courts' dismissal was based on an erroneous understanding of the complaint (i.e., deprivation of constitutionally protected rights need not be "restricted" by "amount in controversy" consideration, if a mere allegation of damages is made).

Respondents respectfully suggest that the only question presented is whether or not the lower court correctly dismissed the complaint due to lack of jurisdiction after a favorable reading of the complaint and application of relevant law thereto.

Statutes and Regulations Involved

Petitioners claim Amendment 14 of the United States Constitution, "equality before the law and due process" is the constitutional (and presumably the only statute, regulation, constitutional provision, treaty or whatever) involved. Respondents represent that the Wisconsin substantive law, the United States District Court rules, the body of enunciated federal law on the subject of dismissal for lack of jurisdiction, the United States Code, including rules of procedure, are involved, and indeed were applied appropriately herein.

Statement of the Case

Petitioners' statement of the case recites that "the question of taxes is not involved here" (Pet. p. 3). Respondents' reading of the complaint, as concurred in by the

trial court and the Court of Appeals, finds no other question than taxation at all. Except for allegations of jurisdiction and damages, every paragraph of the complaint refers to "taxes". The accurate statement of the case is as follows: The original action was commenced by petitioners by complaint alleging aggrievement of petitioners by respondents in the past assessment and collection of real estate taxes levied on petitioners' real estate located within the jurisdiction of respondents in their official capacities as township officials. The complaint, as served, was not answered as such, but rather a motion to dismiss same was made on the grounds of lack of jurisdiction. The District Court required briefing in support of the motion to dismiss, which brief was duly filed and served. Opposition briefing was also filed and served. The Trial Court granted the motion to dismiss; the full text of the written opinion is set forth above. Appeal was taken by petitioners. The United States Court of Appeals, 7th Circuit, required briefs and oral argument, and eventually affirmed the District Court's decision; the full text of this decision is found in the petition filed herein. Now, of course, the petitioners are seeking a Writ of Certiorari from this court.

Grounds for Denying Writ of Certiorari

Respondents respectfully submit that there is, pursuant to Supreme Court Rule 19, absent the requirements

(1) That a court of appeals has rendered a decision in conflict with the decision of another court of appeals in the same matter;

(2) That a court of appeals has decided an important state or territorial question in a way in conflict with applicable state or territorial law;

(3) That a court of appeals has decided an important question of federal law, which has not been, but should be, settled by this court;

(4) That a court of appeals has decided a federal question in a way in conflict with applicable decisions of this court;

(5) That a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Further, respondents suggest that upon a review of the matters raised and passed on below, as shown by the relevant record, the petition for a Writ of Certiorari must be denied.

Argument

The record below is uncomplicated; a duly made motion to dismiss for lack of jurisdiction was granted, and upon appeal, affirmed. The inquiry of this tribunal is to review the matters raised and passed on below, as shown by the record. The United States Supreme Court does not ordinarily decide issues not presented by the parties. *Sherman* v. *U.S.*, N.Y. 1958, 78 S. Ct. 819, 356 U.S.C. 369, 2 L. Ed. 2d 848. The only issue presented by the record and the parties is that of original jurisdiction based on the pleadings.

The District Court's activity in the case has been confined to the question of original jurisdiction and that was the sole issue on appeal to the United States Court of Appeals, 7th Circuit. The United States Supreme Court would not decide questions which had not been passed upon by the Court of Appeals. *U.S.* v. *Fleischman*, App. Ct. D.C. 1950, 70 S. Ct. 739, 339 U.S. 349, 94 L. Ed. 906. *Owens* v. *Union Pac. R. Co.*, Wash. 1943, 63 S. Ct. 1271, 319 U.S. 715, 87 L. Ed. 1683, cert. den. 65 S. Ct. 57, 323 U.S. 740, 89 L. Ed. 593.

The original complaint (Pet. pp. 7-10) complains of the assessment and collection of local real estate taxes. The District Court, in addressing itself to the question of jurisdiction, applied relevant thought and law as it was obliged to do. The complaint, on its face, recites that the taxes were approximately $3,000.00 per year. Because the trial court was obliged to apply the substantive law of Wisconsin in this case, *Erie Railroad* v. *Tompkins*, 1938,

304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, the Wisconsin statute of limitations on redress for alleged taxation wrongdoings, W.S.A. 74.73(1), amortized to deny jurisdiction to the court. Further, the Wisconsin substantive law provides for limits on tort liability also. W.S.A. 74.73 (applicable to Section 70.503 which implements Sections 70.501 and 70.502), 893.205(1), 893.20(1), 895.43(1), 893.21 (1). Any of the quoted sections of Wisconsin substantive law, all of which apply to the limitation of the kind of action attempted to be alleged, would require that only acts occurring in recent years could apply. Even if, then, there were no taxes whatsoever appropriate to petitioners' land over which the respondents exercise taxing power, the $10,000.00 jurisdictional amount is not satisfied, as it appears on the face of the complaint. Damages, either statutory or at common law, are measured by the Wisconsin substantive law and are the actual damages suffered. If, as appears in the complaint, the yearly tax is $3,000.00, this statute of limitations would operate to deny jurisdiction.

Exemplary and punitive damages cannot be calculated in the jurisdictional amount when such damages are not awardable. *Schroeder* v. *Nationwide Mutual Insurance Co.*, D.C. N.Y. 1965, 242 Fed. Supp. 787; *Hart* v. *Ben F. Brack Oil Co.*, D.C. Colo. 1962, 201 Fed. Supp. 465; *Dixon* v. *Northwest National Bank of Minneapolis*, D.C. Minn. 1967, 276 Fed. Supp. 98, and cases cited therein. The Wisconsin substantive law is directly on the point of whether punitive damages may be allowed or recoverable against Township officers. They may not. W.S.A. Sec. 895.43.

Arguendo, punitive damages are applied only under restricted circumstances. Mere allegation of maliciousness

is insufficient by itself to implement punitive damages. Under these considerations, then, certainly the inquiry into the amount of controversy must be independent of punitive damages. Then, as respondents contend, the court lacks jurisdiction as is apparent on the face of the petitioners' complaint. *Arnold* v. *Trocolli*, 344 F.2d 842, 2d Cir. 1965; *Tullos* v. *Corley*, 337 F.2d 884, 6th Cir., 1964. See generally *St. Paul Merc. Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 58 S. Ct. 586, 82 L. Ed. 845, (1938).

Clearly, then, the record before this Court at this time shows that the requisite jurisdictional amount was not present and a Writ of Certiorari would not bring up more record than the Court has before it now in the present petition and this response thereto.

Review by the Supreme Court on certiorari does not encompass local matters and questions of state law, the decision of which does not involve any violation of the Federal Constitution or laws. *Brillhart* v. *Excess Ins. Co.*, 316 U.S. 491, 86 L. Ed. 1620, 62 S. Ct. 1173, and cases therein cited.

The Supreme Court will look to the lower court for the original examination of local questions, and rely for aid upon that court's explanation of its conclusion. *Texarkana* v. *Arkansas Louisiana Gas Co.*, 306 U.S. 188, 83 L. Ed. 598, 59 S. Ct. 448.

This Court has said that where it does not appear on the face of the complaint that the jurisdictional amount is involved, a Federal District Court should dismiss the case *sua sponte* or upon defendant's motion. *Kvos, Inc.* v. *Assoc. Press*, 1936, 299 U.S. 269, 81 L. Ed. 183. Further, this Court has said that its review of the lower court's determination of the jurisdictional amount must be con-

fined to the record. *Thompson* v. *Gaskill*, 1942, 315 U.S. 442, 86 L. Ed. 951 and citations therein. See Annotation 81 L. Ed. 189.

Petitioners' attempt to bring forward an altogether new interpretation of the complaint is beyond the scope of proceedings had herein below and certainly beyond the applicability of this Court's Writ of Certiorari at this time. The Writ of Certiorari should not be granted.

> "Generally speaking, the Supreme Court gives deference to the views of a lower federal court on questions of local law, and will not re-examine the local law as applied by such courts. In dealing with issues of state law that enter into judgments of lower federal courts the Supreme Court is hesitant to overrule decisions by federal courts skilled in the law of particular states, unless their conclusions are shown to be unreasonable. Thus, on a direct appeal from a Federal District Court, the Supreme Court will give proper weight to the District Court's conclusions as to the force and effect of statutes or ordinances of the state in which the court is sitting, and similarly on certiorari to review a judgment of a Court of Appeals reversing an order of a District Court, the Supreme Court will give special weight to a construction by the District Court of the law of the state in which it is sitting. So too, a decision of the United States Court of Appeals as to the law of a state included within the circuit will ordinarily be accepted and left undisturbed by the Supreme Court; that is, the Supreme Court ordinarily accepts the determinations of Courts of Appeals on questions of local law, or such courts' interpretations of state or local law, particularly where neither party to the litigation before the Supreme Court disputes the Court of Appeals' interpretation of the local law, or when the same finding is made by the District Court. A decision of a Court of Appeals as to the

law of a state included within the circuit will be left undisturbed by the Supreme Court where reasonable arguments can be made based on state cases to support a determination of the question either for or against the petitioner's contention. Moreover, it has been held, for example, that the Supreme Court would accept without review the finding of the United States Court of Claims on a question of conveyancing and real property law depending on local law and, being peculiar to the one case, not of general interest. However, although the Supreme Court is disposed to accept the construction which the lower court places on a local statute or ordinances, that disposition need not be yielded to where the lower court is clearly wrong.

"A plain showing of error is required for the Supreme Court to overrule lower federal courts in their application of the rule that in diversity cases federal courts are to apply state law."

32 Am. Jur. 2d, *Federal Practice*, §313 (with citations) pp. 796-8.

Respondents refrain from comment on the scandalous matter found in the petition on file herein.

Conclusion

The court has before it, by virtue of the petition and this response thereto, the complaint, the District Court's decision, the decision of the United States Court of Appeals, 7th Circuit, and argument of both petitioners and respondents. Nothing more could be gained by the issuance of a Writ of Certiorari and a return thereto, for the proceedings below were indeed brief and uncomplicated. Applying relevant consideration and law as herein outlined, respondents respectfully represent that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney for Respondents

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FILED
DEC 22
MICHAEL RODAK, JR.

No. 72-348

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1972, A.D.

JOHN A. HUTTER, et al.,

Petitioners

vs.

JOHN TANCK, et al.,

Respondents

PETITIONERS REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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.D.

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In petitioners complaint averment No. 1 states: "That jurisdiction of this Honorable Court is invoked pursuant to the provisions of Title 28, Sections 1331, 1332 and other sections applicable. This certainly would including those pertaining to Civil rights, which is basically what this case is all about.

The 1968 Amendment to the Civil Rights Act provides in part as follows:

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One of these amendments prohibit two or more persons from conspiring to "injure, oppress, threaten or intimidate any citizens in the free exercise or enjoyment of any right, or privilege secured by him by the Constitution or laws of the United States."

This conspiracy statute carries a stiff penalty of up to a ten year prison sentence and a $10,000. fine.

The other Section of the 1968 Amendment to the Civil Rights Act, was written to apply specifically to persons who commit the same violation while acting under "color of law" which certainly is what these conspirators did in attempting to confiscate petitioners property by conspiracy with directors of the Door County Chamber of Commerce, an agency of Door County, Wisconsin, who drove the petitioners out of business. Milton Haen, Chairman of the Town Board of Egg Harbor and member of the Door County Board is one of the defendants in this action. He consistently approved County funds for this agency.

The petitioners are also entitled to the full protection of their Constitutional rights under any provisions which may be applicable including equal treatment before the law and due process.

Absolutely no amount need be involved to invoke the protection of Civil Rights or Constitutional provisions. Neither is there a diversity of citizenship requirement.

That is also true of actions under the Wisconsin Code, Chapter 70.501 and 70.502. This allows an action in tort for all damages and remedies "given by

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law in actions for damages for tortious or wrongful acts." See averments 12 and 14, page 9, appendix of petition.

Taxes have nothing to do with above provisions and cannot be used as a basis for claiming that the statutory amount was not met in a diversity action.

An action under these provisions could be brought for any tort, and if other requirements were met in a diversity action, under provisions of the Federal Rules of Civil Procedure, real damages for more than $10,000. exclusive of costs and could be claimed. Just what would the amount of real estate taxes assessed for a single year have to do with jurisdiction? This question is entirely irrevelant. The defendants by conspiracy have destroyed the business and use of property by Hutter.

The basic philosophy of a diversity action is the thought that when a citizen of one State sues a citizen of another State, he may not get a fair trial and the citizen of the State where the trial is held would be favored. Hutter believed this when he filed the case referred to in Judge Reynold's decision, namely Hutter Northern Trust v. Haen, et al., No. 17662. He thought the Federal Court would provide a fair, neutral, unbiased tribunal. This action was one directly involving the taxes assessed against Hutter.

It seems to Hutter that the idea that a diversity action in a Federal Court will give both parties an equally fair trial, is erroneous. For practical purposes the Federal Court in a particular State may not differ essentially from the State Court; the personnel is likely to be the same. Here Judge Myron L. Gordon

and John W. Reynolds were formerly judges or officials of the State of Wisconsin. Their sympathy would not be for Hutter the intruder from Illinois. It would favor fellow elected officials of Wisconsin. Like my old friend attorney Miller tells me, a judge can always find a decision to fit his opinion. It is almost impossible to find a truly neutral Court. That is why Chief Justice Burger went to Maine to get a judge to hear the contempt charges against the "Conspiracy 7" in Illinois. That is also why a judge from Tennessee was brought to Illinois to hear the case against Appeals Judge Lerner.

When Hutter found this out the hard way, he proceeded through the State Courts of Wisconsin to secure relief from his taxes. This matter is now pending before the Supreme Court of Wisconsin No. 129. It has been on the books so long that the number above was changed from No. 55.

Hutter believes his Honor Judge John W. Reynolds was wrong when he held this case was essentially the same as the one filed before Judge Gordon. That case involved taxes; this one does not. This case involves (1) the violation of Hutter's Civil and Constitutional rights (No diversity claim is necessary here) and (2) the claim for damages in tort under Wisconsin statutes, Chapters 70.501 and 70.502. This is a diversity matter in which Hutter claims real damages in excess of $10,000. exclusive of costs or interest. Ignoring the statute, there would be no limitation on tort damages for conspiracy.

The District Court certainly had jurisdiction on above facts.

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The Court is asked to review Hutter's Petition for Rehearing to Court of Appeals, pages 11-12-13 of the petition for Certiorari.

On page 12 respondents say, "Respondents refrain from comment on the scandalous matter found in petition."

Hutter's experience with the above named Judges is such that he tried to limit averments to avoid countless objections to the number and form of averments which would delay the case. This is why he did not include an averment containing the facts set forth on pages 12 and 13 of appendix of petition.

A motion in the District Court in Chicago usually takes only a few days for a decision. In Milwaukee it takes several months.

In averment 12, page 9 of petition, Hutter refers to the case against the agency of Door County, the corporation, the Door County Chamber of Commerce, (Slander, libel, and denial of the use of this public facility forced Hutter out of the resort business).

Hutter has reversed his Honor Judge Julius J. Hoffman, three times and the case No. 67 C 1261 has been assigned to another judge. Six years have elapsed by dilatory tactics. The same has been true in the case involving the Town Board of Egg Harbor, including the defendants herein. These have been continuing torts from 1960 to date.

The decisions of the Appeals Courts necessitated filing in Wisconsin claims against the directors, officers and agents of the corporation. This case No. 70 C 290

is before Judge Gordon. On motion of defendants (attorney Kirkegaard) he dismissed the case without right to amend because he did not like the averments (the same averments approved by Appeals Court in 67 C 1261). The Appeals Court Seventh Circuit reversed him. Now he has emasculated the amended complaint and there is serious question whether defendants will have to answer interrogatories that are awaiting answer for over two years. (Attorney Kirkegaard secretly wrote Judge Gordon asking him to prevent Hutter from continuing to appear as attorney pro se for himself and wife).

Yes indeed, it is almost impossible for a resident of this Country to obtain justice where his opponent is a unit of government, or establishment that has unlimited clout and influence. The Court might be interested in reviewing Hutter's petition for rehearing in No. 71-1419 and No. 72-447.

In opposition brief page 6 and 7, respondents indicate that they believe No. (4) and (5) do not apply. Innumerable decisions of this Court have certainly held that persons have recourse in the Federal Courts for violation of their Civil and Constitutional rights without regard to any amount of money involved.

Referring to page 8 of respondents Argument: The question is does the District Court have jurisdiction where plaintiffs claim in their complaint that their Civil and Constitutional rights have been violated by conspirators?

Continuing on page 10 respondents state: "Review by the Supreme Court does not encompass local matters and questions

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of State law, the decision of which does not involve any violation of the Federal Constitution or laws." The entire thrust of this action is precisely this violation of the Constitution and Civil rights law.

Continuing, "This Court has said that where it does not appear on the face of the complaint that the jurisdictional amount is involved, a Federal District Court should dismiss the case sua sponte? How could this be? Only diversity actions require a jurisdictional amount, certainly not Civil rights cases.

On pages 11 and 12 respondents quote from 32 Am. Jur. 2d Federal Practice P. 313 pp. 796-8.

"A plain showing of error is required for the Supreme Courts in their application of the rule that in diversity cases, Federal Courts are to apply State law."

The State of Wisconsin law specifically authorizes an action for damages as quoted in complaint. Nevertheless do the respondents claim that a citizen of Wisconsin could not sue another citizen of Wisconsin in tort for any amount of damages resulting from conspiracy?

Do they further assert that a citizen of Illinois could not sue a citizen of Wisconsin under the same circumstances in a diversity action and claim actual damages in excess of $10,000. not including costs and interest?

Do they further assert that no person may sue for violation of his Civil and Constitutional in Federal Courts without a statutory amount being involved?

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For over seven years, by means of dilatory technical roadblocks, with the cooperation of the Courts, the "establishment" in Door County, Wisconsin has been able to destroy the Hutter's reputation, business and property. They seek the further cooperation of this Court.

CONCLUSION

The petitioners believe that the law is clear and that they should be granted their petition for a Writ of Certiorari.

Respectfully submitted,

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GR 7-2259
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